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No. 75-7851

In the Supreme Court of the United States

OCTOBER TERM, 1975

FRANK J. MANTA and LEO J. MANTA, individually and as Co-Executors of the Estate of JOHN L. MANTA, Deceased, GEORGE L. MANTA, BARBARA MANTA, STEPHEN J. MANTA, HELEN MANTA, LEO G. MANTA, CLARA MANTA KARONES, NIKI MANTA MARKS, ANGELA MANTA KARAFOTIAS, CHRIST KARAFOTIAS and J. L. MANTA, INC., an Illinois corporation,

Petitioners,

vs.

NICHOLAS J. P. TRYFOROS, BEBE SPANOS IKARIS and VASILLIOS G. SPANOS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners, who were defendants in the District Court, Frank J. Manta and Leo J. Manta, individually and as Co-Executors of the Estate of John L. Manta, Deceased, George L. Manta, Barbara Manta, Stephen J. Manta, Helen Manta, Leo G. Manta, Clara Manta Karones, Niki Manta Marks, Angela Manta Karafotias, Christ Kara-

fotias and J. L. Manta, Inc., an Illinois corporation, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 3, 1975.

OPINIONS BELOW

The decisions of the District Court are unreported. The opinion of the Circuit Court of Appeals is reported in 518 F. 2d 1258 (7th Cir. 1975). The relevant decisions in the District Court and the opinion of the Court of Appeals appear in the Appendix.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 3, 1975. A timely petition for rehearing en banc was denied on September 5, 1975, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1) Whether a foreign corporation which is conducting no business and has no office in the judicial district is effectively served when the Marshal delivers summons to the wife of the president at their residence, there being no other place in the judicial district to serve the corporation?

2) Whether the Marshal's return showing service and the docket showing service import verity and regularity of service and are conclusive proof of service when no evidence is introduced to impeach them?

3) Whether service of summons on a small, closely held corporation is waived by the active participation in the case by all the corporate officers and three of the four corporate directors when the fourth director knew of the

case and approved of the proceedings and when all those who the Final Pretrial Order showed were shareholders of the corporation were parties to the action except for the owner of a small number of shares who also knew of the action and approved of it?

4) Whether the District Court acted properly and reasonably when it required that a person who claimed to be a shareholder of a corporation, and whose status as a shareholder was in question, submit to the court's jurisdiction and file a petition sworn to by him alleging that he was a stockholder as a condition of entertaining his objection to the dismissal of a shareholder's derivative action with prejudice to the corporation?

5) Whether petitioners were denied due process of law when they were not afforded an opportunity to introduce evidence in the District Court to show that effective service was had on the corporation in a shareholder's derivative action or to respond to the claim of one objecting to the dismissal of a shareholder's derivative action that he was a shareholder of the corporation?

6) Whether the District Court had authority to award attorneys' fees to the winning party in an action based on "diversity jurisdiction" when the losing party acted vexatiously and for oppressive reasons?

7) Whether petitioners have been deprived of a just, speedy and inexpensive determination of the action?

REGULATIONS INVOLVED

The pertinent provisions of the Federal Rules of Civil Procedure, 28 U.S.C. (1970) are set forth in the Appendix at pp. 40-41.

STATEMENT OF THE CASE

The reason for this petition is that the court below was in error when it held that Icarian was not a party to a stockholder's derivative action and reversed an award of attorneys' fees.

Icarian Development Company

In 1960 Nick Spanos, a California attorney and John and George Manta, two Chicago businessmen, caused Icarian Development Company, S.A. ("Icarian"), a Panamanian corporation to be organized as a holding company to invest in Iranian shipping ventures. The corporation had less than 15 shareholders; they were Nispan Corporation, a corporation controlled by Nick Spanos and his family, Nicholas Pastis, and John and George Manta, their spouses and children. From the time Icarian commenced to do business until John Manta's death in 1968, its officers and directors were:

John Manta	President and director
Nick Spanos	Vice President and director
George Manta	Secretary-Treasurer and director
Elizabeth Spanos (Nick Spanos' mother)	Director

The businesses in which Icarian invested were not successful. Nick Spanos blamed the Mantas for their disappointing performances and arranged for a shareholder's derivative action to be filed against them.

The Lawsuit

This action was filed on April 9, 1968 in the United States District Court for the Northern District of Illinois. Jurisdiction was based on diversity of citizenship and

jurisdictional amount. The case was assigned to the Honorable Edwin A. Robson, then Chief Judge of the District Court.

The plaintiffs who are respondents herein, were Bebe Spanos Ikaris, Nick Spanos' sister, and Nicholas J. P. Tryforos, a New York attorney and longtime friend of Nick Spanos. Plaintiffs were then the owners of the Icarian stock which had been originally issued to the corporation which Nick Spanos controlled. The defendants were John and George Manta, their wives, their children, George Manta's son-in-law and a family owned business ("The Mantas"). The complaint named Icarian as a "nominal defendant".

Service of Summons

Service of summons was directed by the plaintiffs who requested the Marshal to serve John Manta, his wife Barbara Manta and Icarian at John Manta's residence. It was necessary to effect service on Icarian at John Manta's residence because Icarian was not conducting business, did not have an office where it could be served, and the only place in the jurisdiction to effect service was at the home of the president. John Manta was then 80 years old; he had suffered a severe heart attack in 1967 and was confined to his home. The Marshal went to John Manta's residence and delivered the three summonses to Mrs. Manta. The Marshal's return states that service was made on Icarian by service on Mrs. Barbara Manta. Below a line under her name in parenthesis appears the following printed language: "Individual or agent of company, corporation, etc." The docket recites service was made on Icarian.

A subsequent effort to serve Icarian was attempted. The second summons directed the Marshal to serve "John

Manta, Icarian's president", at his residence. That summons was returned "not completed" and there were no further efforts to serve Icarian.

The Pleadings

The complaint was verified by Nick Spanos. It charged among other matters that in 1965 the Mantas had converted $285,000 belonging to Icarian. The Mantas filed answers denying the allegations, and documents referred to in the depositions and the Final Pretrial Order show that the $285,000 which the Mantas were accused of converting had been used by Icarian in the businesses of its subsidiaries.

Change in Icarian

John Manta died on November 19, 1968, some seven months after the lawsuit was filed. His death gave Nick Spanos control of Icarian since he and his mother were two of the three remaining directors. Nick Spanos subsequently called a special meeting of Icarian's Board of Directors and, with the concurrence of his mother, elected a new director and president to fill the vacancies created by John Manta's death, and some additional officers.

Proceedings in The District Court

The proceedings in the District Court are reflected in the 44 page docket and reveals lawyers carefully preparing a complex case for trial. The docket is replete with motions, hearings, stipulations, interrogatories, depositions, notices for production of documents and requests for admissions of fact. The docket also reflects that plaintiffs changed their attorneys seven times during the pendency of the litigation adding to the complexity of the case unnecessarily and prolonging the action.

The extensive discovery and pretrial preparation of the attorneys culminated in the entry of a 77 page Final Pretrial Order on February 20, 1973. The Order contained lengthy stipulations of fact, the names of witnesses to be called at the trial, exhibits to be introduced and 49 contested issues for the District Court to decide. One of the contested issues raised by the Mantas was "Was Icarian . . . properly served and is it a necessary and indispensable party in this action?" They raised this issue because they wanted to be sure that the decision would be binding on Icarian which was then controlled by Nick Spanos and that they would not have to relitigate the same issues in another forum.[1] The Mantas were confident the issue would be resolved in their favor because at the trial they were prepared to present evidence that John Manta received the summons intended for Icarian and would explain why no appearance was necessary for Icarian.

In November 1970, Tryforos and Ikaris became dissatisfied with Judge Robson when he ruled that Nick Spanos (who had appeared "of counsel" on the pleadings), could not represent them because he was going to be their witness at the trial and such dual participation was a violation of Canon 5 of the Canons of Professional Ethics. Plaintiffs began to have thoughts of litigating this action elsewhere when two years later Judge Robson refused to entertain their motion for summary judgment. They finally decided to abandon their suit in the Northern District of Illinois in May 1973, when Judge Robson entered an order requiring them to deposit $5,000 as security for

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[1] The Mantas had already been named defendants in two other actions orchestrated by Nick Spanos involving Iranian shipping ventures in which Icarian had invested. The crossclaim of *Iranian Shipping Lines, S.A., et al.*, v. *Moraites, et al.*, 67 Civ. 9 (D.C.S.D. N.Y.) and *Letts* v. *Icarian Development Company, S.A., et al.*, 72 Civ. 1468 (D.C.S.D.N.Y.).

costs. Judge Robson, however, informed them that if they could not afford to post the $5,000 they should submit affidavits stating that they did not have the necessary funds and he would reconsider his order. In response to this offer Tryforos and Ikaris filed affidavits accusing Judge Robson of distorting the truth, humiliating and degrading them, prejudging the issues in the case, making statements prejudicial to them and evidencing an absolute and complete disregard for their rights.

On August 2, 1973, Tryforos, without leave of court, filed another affidavit stating plaintiffs did not wish to proceed with the litigation for a mixture of financial and tactical reasons; nevertheless he requested that the case be transferred to the Southern District of New York. In addition, he stated that the Court did not have jurisdiction because Icarian had not been served and had not filed an appearance.

On November 8, 1973, Tryforos and Ikaris appeared in person before Judge Robson and advised him they had sold their stock in Icarian and were no longer stockholders. Judge Robson, apparently finding it difficult to believe that the sale was bona fide because Icarian had no business and no assets except for this cause of action which was subject to dismissal with prejudice if plaintiffs did not proceed, required Tryforos to file an affidavit setting forth the circumstances of the sale. Tryforos responded two months later when he filed an unsworn statement stating that plaintiffs had sold their stock to Nicholas Pastis. Pastis was identified in the Final Pretrial Order as the only stockholder of Icarian who was not a party to the litigation. The record discloses he is a friend of Nick Spanos and Ikaris. Ikaris had reported to him about this case in written communications and Pastis' wife had expressed their approval of the action. Mrs. Pastis was the

person elected President of Icarian after John Manta's death.

Therefore, after five and one-half years of litigation Judge Robson had no alternative but to dismiss the case with prejudice because there were no plaintiffs. However, because this was a derivative action, Judge Robson, in compliance with Rule 23.1 Federal Rules of Civil Procedure, directed the Clerk of the Court to send notices to the Icarian stockholders informing them that the suit would be dismissed with prejudice. Although plaintiffs' attorneys had previously stipulated and pretrial discovery had disclosed that all the stockholders of Icarian were participants in the case except for Pastis, Tryforos stated in his August 2, 1973 affidavit that Icarian had four other stockholders who had not been previously identified. To be sure that everyone who might conceivably have an interest in Icarian received notice, the Mantas informed Judge Robson of the additional persons Tryforos claimed were shareholders, and he instructed the District Court Clerk to send notices to the four names belatedly disclosed. The Notice stated:

> "The Court had indicated that it proposes to enter an order of dismissal with prejudice on March 11, 1974, on the grounds of failure to prosecute and disposition by plaintiffs of their shares of Icarian Development Company, S.A. If you wish to appear in said action on behalf of Icarian Development Company, S.A., you are requested to notify the undersigned in writing on or before March 4, 1974, and to appear in person or by counsel . . . on March 11, 1974. . . ."

V. G. Spanos

No notice was received by the Clerk on March 4, 1974. On March 11, 1974, Sean O'Hara, a California attorney, appeared before Judge Robson and informed the court

that he represented V. G. Spanos (who is also a respondent herein), a citizen and resident of Greece and that he wished to file objections on behalf of his client, a stockholder of Icarian, to the dismissal of the lawsuit with prejudice claiming that Icarian was not properly served. In the alternative, O'Hara asked that the case be transferred to the United States District Court for the Southern District of New York. There was no evidence in the record that V. G. Spanos was a stockholder, and O'Hara admitted he had never before met or represented V. G. Spanos and could not state for certain that he was a stockholder. The only thing of which the District Court was certain about V. G. Spanos was that he was Secretary of Icarian, having been elected to that office after John Manta's death. Judge Robson stated he wanted V. G. Spanos to submit to the jurisdiction of the Court and be subject to his contempt power, and therefore ordered that V. G. Spanos file his petition under oath within two weeks submitting evidence of stock ownership and stating he was not in collusion with plaintiffs or a participant in state court litigation in New York in which Icarian had sought to enjoin plaintiffs from prosecuting this case.[2]

Two weeks later O'Hara filed an additional document advising the Court that he was unable to get a petition from his client; however, he had obtained "Supplemental Objections" sworn to by Mrs. V. G. Spanos. O'Hara, however, was careful to advise Judge Robson that the state-

[2] This was another effort by Nick Spanos who controlled Icarian to avoid a trial on the merits in this case in the Northern District of Illinois. Although the action was virtually unopposed because Tryforos and Ikaris interposed only a token defense, the Supreme Court of New York refused to grant the injunction which Icarian had sought. *Icarian Development Company, S.A.* v. *Tryforos and Ikaris*, Supreme Court of New York County of New York, Case No. 25663/72.

ments contained in the Supplemental Objections were the opinions of Mrs. Spanos and did not necessarily reflect his own.

Mrs. Spanos' "Supplemental Objections" were the same objections O'Hara had earlier attempted to file on behalf of her husband. Mrs. Spanos stated her husband was a stockholder and attached as an exhibit a xerox copy of an undated stock certificate in her husband's name. Although an Icarian stock certificate had originally been prepared in the name of V. G. Spanos, the record discloses that it was never delivered to him. It was also suspicious that O'Hara who claimed he was unable to get a petition from V. G. Spanos, was able to get the "affidavit" from Mrs. Spanos who was in New York and just happened to have a copy of a stock certificate in her husband's name. Because V. G. Spanos failed to comply with his order, Judge Robson denied O'Hara leave to file his objections. Judge Robson then dismissed the case with prejudice and two weeks later awarded the Mantas $92,500 as reasonable attorneys' fees for the oppressive and vexatious manner in which Tryforos and Ikaris prosecuted the action.

Tryforos and Ikaris appealed the dismissal with prejudice as to Icarian and the award of attorneys' fees. V. G. Spanos appealed the District Court's refusal to grant him leave to file his objections and the dismissal with prejudice as to Icarian. Their appeals were consolidated.

The Decision of The Court of Appeals

Although there was no evidence in the record, the Court of Appeals decision reflects its opinion that V. G. Spanos was a stockholder of Icarian. Its opinion states that his objections ". . . did not raise the possibility of further protracted proceedings . . ." and they were ". . . persuaded that the underlying purpose of the Rule 23.1 requirement

of notice to shareholders as a precondition to the dismissal of derivative litigation would be frustrated if the showing made by [V. G.] Spanos in this case was considered insufficient to entitle him to file his objections to the form of dismissal." The Court of Appeals then decided V. G. Spanos had "adequately raised the questions of the district court's jurisdiction over Icarian . . ." and said:

> There is nothing in the record, including the Marshal's Return, to identify the individual to whom the summons was delivered as an agent authorized to receive service of process on behalf of the corporation. Moreover, since the record discloses that there was a subsequent unsuccessful attempt to effect service on the corporation and since one of the contested issues identified in the Final Pretrial Order was the sufficiency of the service of process on Icarian, the ambiguous Marshal's Return provided an inadequate basis for the court's conclusion that all defendants had been served with process.
>
> Inasmuch as Icarian was not a party to the litigation, the order of dismissal was necessarily without prejudice to the rights of the corporation.

Finally, the Court of Appeals reversed the award of the attorneys' fees relying on a footnote in this court's opinion in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 decided May 12, 1975.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS IN PRINCIPAL WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER CONSTRUCTION OF RULE 4(d) OF THE FEDERAL RULES OF CIVIL PROCEDURE WHEN A DEFENDANT HAS RECEIVED ACTUAL NOTICE OF A SUIT.

Rule 4(d)(3) provides for the summons and complaint to be served upon a corporation ". . . by delivering a copy . . . to an officer . . . or to any other agent authorized by appointment or by law to receive service of process. . . ."

The Marshal's return was regular on its face and recites service on Icarian by service on Mrs. Barbara Manta ". . . agent of the . . . corporation." No evidence was offered to impeach the Marshal's return or show that Barbara Manta was not an agent except the unproven allegations of Tryforos and V. G. Spanos, allegations which were in the form of conclusions of law rather than factual assertions. In holding that service was not proper, the Court of Appeals disregarded the Marshal's return and construed Rule 4(d) of the Federal Rules of Civil Procedure in an improper and unreasonably restrictive manner. This construction conflicts in principal with the holdings in the Second, Fourth, Fifth, Sixth and District of Columbia Circuits that the provisions of Rule 4(d) for service on individuals and corporations are to be liberally construed to further the purpose of finding personal jurisdiction in cases in which the party has received actual notice. *Grammenos* v. *Lemos,* 457 F. 2d 1067 (2nd Cir. 1972); *Karlsson* v. *Rabinowitz,* 318 F. 2d 666 (4th Cir. 1963);

Nowell v. *Nowell,* 384 F. 2d 951 (5th Cir. 1967), cert. denied, 390 U.S. 956 (1968); *Rovinski* v. *Rowe,* 131 F. 2d 687 (6th Cir. 1942) and *Williams* v. *Capital Transit Co.,* 215 F.2d 487 (D.C. Cir. 1954).

The purpose of Rule 4(d) is to assure that the party served is notified that an action has been filed against it. There is no question but that Icarian had notice of the suit; all of its officers and three of its four directors were participants in the case and the fourth director, Elizabeth Spanos, had knowledge of what was going on and approved of the plaintiffs' action. In addition, all of those who the Final Pretrial Order stated were Icarian shareholders were parties except for Pastis who acknowledged in writing he approved of the action. Since this was a stockholder's derivative action, the corporation was characterized as a nominal defendant and no relief was sought against it nor was any action required of it.

The reason for the rule requiring the corporation to be made a party in a stockholder's derivative action is to protect the persons being sued against a second suit by the corporation on the same facts. *See Davenport* v. *Dows,* 85 U.S. (18 Wall.) 626 (1873); *Philipbar* v. *Derby,* 85 F.2d 27 (2nd Cir. 1936). It is a bizarre twist of this case that the court below relied upon a rule designed to protect a defendant against additional suits to support its conclusion.

2. THE DECISION BELOW CONFLICTS IN PRINCIPAL WITH THE DECISION OF ANOTHER COURT OF APPEALS AS TO THE PRESUMPTION OF SERVICE CREATED BY A MARSHAL'S RETURN.

The Marshal's return recited service. The docket recited service. No evidence was introduced to impeach the Marshal's return. Nevertheless the court below deter-

mined the Marshal's return ambiguous and concluded there was no service. This decision conflicts in principal with a holding of the Court of Appeals for the Eighth Circuit that a Marshal's return of summons imports verity which can be overcome only by strong and convincing evidence. *Hicklin* v. *Edwards*, 226 F. 2d 410 (8th Cir. 1955). No such evidence was introduced.

3. THE DECISION BELOW WAS IN ERROR AND DENIED A PARTY DUE PROCESS OF LAW WHEN IT DENIED THEM THE OPPORTUNITY OF AN EVIDENTIARY HEARING ON THE ISSUES OF (i) SUFFICIENCY OF SERVICE OF PROCESS ON ICARIAN AND (ii) V. G. SPANOS' STOCKHOLDER STATUS.

(1) Tryforos and Ikaris initiated the case and directed service of process on the Mantas and Icarian. The Mantas knew that John Manta, Icarian's president had received the summons directed to Icarian because Mrs. Manta had given it to her husband along with the other two summonses which were simultaneously served upon her. The Mantas intended to offer this evidence at the trial together with evidence that John Manta was at home ill in bed when the Marshal arrived and requested his wife to accept the summonses from the Marshal and give them to him. When plaintiffs refused to prosecute this case, the Mantas never had the opportunity to offer this evidence. Tryforos and Ikaris could have raised the issue of service at any time by motion, but although Tryforos stated in an affidavit filed without leave of court that Icarian had not been served, they never filed the necessary formal motion pursuant to Rule 12(b) of the Federal Rules of Civil Procedure to place the question of service in issue requiring the Mantas to respond and the Court to decide the question.

(2) The Court of Appeals was in error in failing to remand the case to the District Court for a hearing when it concluded the Marshal's return was "ambiguous" and denied the Mantas due process since they never had an opportunity to present evidence on this issue.

(3) No hearing was ever held in the District Court on whether V. G. Spanos was a shareholder of Icarian. The Court of Appeals was in error and denied the Mantas due process in failing to remand the case to the District Court for a hearing on this issue.

(4) The Court of Appeals also committed error in concluding that the conditions imposed by Judge Robson as a condition of V. G. Spanos filing objections to the dismissal with prejudice were in any manner inappropriate or unreasonable. The Court of Appeals assumed that the objections V. G. Spanos sought to present did not raise the possibility of further protracted proceedings before the District Court. Judge Robson who after six years of litigation had detailed knowledge of the case, anticipated that time consuming efforts, discovery and one or more hearings would be required to dispose of the issue of V. G. Spanos' stockholder status and the sufficiency of service. In view of the fact that the Final Pretrial Order showed that V. G. Spanos was not a stockholder, it was reasonable for Judge Robson to require him to submit to the District Court's jurisdiction and present his sworn petition attesting to his shareholder status before the Court considered his objections. The condition imposed was neither inappropriate nor inconsistent with the provisions of Rule 23.1 Federal Rules of Civil Procedure that "[t]he action shall not be dismissed . . . without . . . notice . . . to shareholders or members *in such manner as the court directs.*" (Emphasis added.) Under that rule Judge Robson had the authority in the first instance to require that all objecting stockholders submit to the court's jurisdiction by filing a sworn petition.

4. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT ON THE RIGHT OF A FEDERAL COURT TO AWARD COUNSEL FEES IN A DIVERSITY ACTION TO A SUCCESSFUL PARTY WHEN HIS OPPONENT HAS ACTED VEXATIOUSLY AND FOR OPPRESSIVE REASONS.

In *F. D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116 (1974) and *Hall* v. *Cole*, 412 U.S. 1 (1973), this Court held that federal courts may award counsel fees to a successful party when his opponent has acted in bad faith, vexatiously, wantonly or for oppressive reasons. But, in a footnote in *Aleyska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975) this Court said "[a] very different situation is presented when a federal court sits in a diversity case." That footnote stated that a federal court should follow the *policy* of the state in which it sits to allow plaintiffs to recover attorneys' fees in certain cases.

The Court of Appeals held that there was no Illinois authority for the award of attorneys' fees except when allegations and denials are made without reasonable cause, not in good faith and found to be untrue. The Court below acknowledged that the policy behind the Illinois rule is ". . . to penalize the litigant who . . . puts the burden upon his opponent to expend money for an attorney to make a defense against an untenable suit." Because the policy of the Illinois rule is the same as the federal rule, the court below was in error when it reversed the award of attorneys' fees.

In cases seeking equitable relief, even when based on diversity, a federal court should not, when a party acts in bad faith, be restricted in awarding attorneys' fees by the law of the state in which it sits. The award of attorneys' fees is within the court's inherent equitable powers. In many diversity cases the plaintiff has a choice of forums

in which to litigate; it is unfair to permit a party to prosecute an equitable action in bad faith by selecting a forum where he knows the state law does not permit the imposition of attorneys' fees.

5. THE DECISION BELOW CONFLICTS IN PRINCIPAL WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE APPLICATION OF RULE 1 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The decision below conflicts in principal with the holding of the Fifth and Eighth Circuits that Rule 1 of the Federal Rules of Civil Procedure ". . . be construed to secure the just, speedy and inexpensive determination of every action." *Courtesy Chevrolet, Inc.* v. *Tennessee Walking Horse Breeders' and Exhibitors' Ass'n. of America,* 344 F. 2d 860 (9th Cir. 1965); *Nowell* v. *Nowell,* 384 F. 2d 951 (5th Cir. 1967). This is not accomplished when after six years of bitterly contested litigation in the District Court, a 77 page pretrial order, voluminous discovery and a 44 page docket with over 500 entries, the Court below construes the federal rules to permit Icarian, now controlled by Nick Spanos and Nicholas Pastis, to commence new litigation in another forum on the same subject matter.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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Counsel for Petitioners

December 2, 1975

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Nicholas J. Tryforos and Bebe Spanos Ikaris, Trustees, on Behalf of Themselves and All Other Stockholders of Icarian Development Company, S.A., Similarly Situated,
Plaintiffs,

vs.

Icarian Development Company, S.A., a Panamanian corporation, George L. Manta, Christ Karafotias, Barbara Manta, Frank J. Manta (a/k/a Mark Frank Manta), Leo J. Manta, Stephen J. Manta, Helen Manta, Leo G. Manta, Clara Manta Karones, Angela Manta Karafotias, Niki Manta Marx, Frank J. Manta and Leo J. Manta, as Co-Executors of the Estate of John L. Manta, Deceased, and J. L. Manta, Inc., an Illinois corporation,
Defendants.

No. 68 C 656

ORDER OF DISMISSAL WITH PREJUDICE

This matter by Order entered January 28, 1974 having been continued to March 11, 1974 at 10 o'clock A.M. for the purpose of entering an order of dismissal with prejudice, and certain objections to the Court's Findings of Fact and Conclusions of Law and Order entered January 28, 1974 having been presented on March 11, 1974 by Sean O'Hara, claiming to be attorney for Vassilios G. Spanos,

which objections were denied by the Court on March 11, 1974, and further objections having been presented by Sean O'Hara on behalf of Vassilios G. Spanos on March 25, 1974 which the Court considered and refused leave to file on March 27, 1974, and neither any person claiming to be a shareholder of Icarian Development Company, S.A. nor Icarian Development Company, S.A. having petitioned for leave to continue the prosecution of this action, and the Court being fully advised in the premises, It Is Hereby Ordered

1. That this case be and hereby is dismissed with prejudice for the failure of plaintiffs to prosecute this action with costs and attorneys' fees to be borne by plaintiffs;

2. That Richard F. Watt is granted leave to withdraw as attorney for plaintiffs; and

3. That the Court hereby retains jurisdiction over this matter for the purpose of assessing attorneys' fees and costs against plaintiffs and this matter is set for hearing on April 3, 1974 at 10 o'clock A.M. for the purpose of considering the petition of defendants for award of attorneys' fees and costs.

Dated: March 27, 1974

Enter: *Edwin A. Robson*
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Nicholas J. Tryforos and Bebe Spanos Ikaris, Trustees, on Behalf of Themselves and All Other Stockholders of Icarian Development Company, S.A., Similarly Situated,
Plaintiffs,

vs.

Icarian Development Company, S.A., a Panamanian corpoporation, George L. Manta, Christ Karafotias, Barbara Manta, Frank J. Manta (a/k/a Mark Frank Manta), Leo J. Manta, Stephen J. Manta, Helen Manta, Leo G. Manta, Clara Manta Karones, Angela Manta Karafotias, Niki Manta Marx, Frank J. Manta and Leo J. Manta, as Co-Executors of the Estate of John L. Manta, Deceased, and J. L. Manta, Inc., an Illinois corporation,
Defendants.

No. 68 C 656

FINDINGS OF FACT AND ORDER AWARDING ATTORNEYS' FEES TO DEFENDANTS

This matter coming on to be heard on the Petition of Defendants for Award of Attorneys' Fees, and having been specifically set pursuant to this Court's Order entered January 28, 1974, for such determination on March 11, 1974, and certain objections presented by one V. G. Spanos claiming to be a shareholder of defendant Icarian Development Company S.A., having been heard on March 11, 1974 and March 25, 1974, and this action having been dismissed with prejudice on March 27, 1974, with jurisdiction being

retained over this matter for the purpose of acting upon the Petition of Defendants for Award of Attorneys' Fees and Costs against plaintiffs, and this matter having been continued for such purposes for hearing on April 4, 1974, and defendants having appeared by counsel on April 4, 1974 and presented said Petition filed on March 7, 1974 supported by a Certification of Attorney Seymour F. Simon, a Certification of Attorney Max M. Fleisher and a Certification of Attorney H. Reed Harris setting forth the number of hours devoted by each of them to the defense of this action and the specific nature of the matters to which such time was devoted, and also supported by affidavits of Attorney Fredric R. Finne, Attorney William J. Jovan and Attorney Bernard B. Wolfe, members of the Bar of this Court and attorneys licensed to practice in the State of Illinois, which affidavits stated the qualifications of Messrs. Simon, Fleisher and Harris and the amount which in the opinion of affiants was a reasonable hourly charge for the services of Messrs. Simon, Fleisher and Harris, and plaintiffs having had notice of such hearing on April 4, 1974, but not having appeared, and the Court being fully advised in the premises,

The Court Finds As Follows:

1. The Complaint in this action was filed on April 9, 1968 by Nicholas J. Tryforos and Bebe Spanos Ikaris who claimed to be assignees of the stock of Icarian Development Company S.A. (hereafter called "Icarian"), formerly owned by Nispan Corporation, a dissolved Panamanian corporation. A First Amended Complaint was filed with leave of Court over the objection of defendants on or about October 9, 1970.

2. The individual defendants in this action are Frank J. Manta and Leo J. Manta, Co-Executors of the Estate of John L. Manta, Deceased, George L. Manta, Christ Kara-

fotias, Barbara Manta, Frank J. Manta (a/k/a Mark Frank Manta), Leo J. Manta, Stephen J. Manta, Leo G. Manta, Angela Manta Karafotias and Niki Manta Marx, who are represented by Attorney Seymour F. Simon, and Helen Manta and Clara Manta Karones, who since on or about September 1, 1971 have been represented by Attorney Max M. Fleisher. In addition, there are two defendant corporations: one of them is Icarian, a Panamanian corporation; and the other is J. L. Manta, Inc., an Illinois corporation. The latter corporation is represented by Mr. Simon. All of the individual defendants are residents of Illinois and are related to each other.

3. All of the defendants were served with process by the United States Marshal for the Northern District of Illinois and have appeared in this action by either Mr. Simon or Mr. Fleisher or Mr. Fleisher's predecessor, Nathan Engelstein, except that Icarian has entered no appearance.

4. Plaintiffs' action is a shareholders' derivative suit on behalf of Icarian and its shareholders. Plaintiffs claim that the defendants other than Icarian converted to their own use certain funds and assets belonging to Icarian or to which Icarian was entitled.

5. There has been extensive discovery in this action. Defendants have taken the depositions of both plaintiffs and have taken the deposition of Nicholas Pastis in New York for the limited purpose of verifying his signature on one of defendants' exhibits. Defendants have also taken the deposition of Harry C. Hall, an employee of Brown Brothers Harriman & Company, for the purpose of authenticating certain documents in the possession of said company. Plaintiffs have taken the depositions of Defendants George L. Manta, Christ Karafotias, Leo J. Manta and

Mark Frank Manta. In addition, the parties have submitted to each other voluminous interrogatories and requests for admissions of fact to which response has been made, and both plaintiffs and defendants have produced voluminous documents for inspection of the opposing parties.

6. On February 20, 1973, the Court entered a Final Pretrial Order which is seventy-seven pages in length and which contains twenty-nine separately numbered paragraphs of stipulations of fact and one hundred three separately numbered paragraphs of detailed statements of fact admitted by plaintiffs, as well as several exhibits offered by plaintiffs and a list of approximately 179 exhibits defendants stated they might offer at trial. The Final Pretrial Order was entered after many lengthy pretrial conferences, the first of which was held on November 5, 1971. There have been numerous court hearings on various motions and other matters which have arisen in the course of this proceeding. Included among these and in addition to several other matters there have been many contested discovery matters, a motion by plaintiffs for jury trial filed approximately two and one-half years after the filing of the action, motions raising issues as to the jurisdiction of this Court, and a motion by defendants to exclude Nick C. Spanos (hereafter called "Spanos"), the brother of Plaintiff Ikaris and an officer and director of Icarian, from participating as an attorney in this action by reason of Canon 5 of the Code of Professional Responsibility and Canons of Judicial Ethics adopted by the American Bar Association effective January 1, 1970. On May 8, 1970, Allan J. Newman, who was then counsel for plaintiffs wrote to Mr. Simon with respect to depositions which were to be taken of plaintiffs and informed Mr. Simon as follows:

> "In the interest of proceeding in this matter on an orderly basis, I have persuaded Mr. Spanos to forego his right to attend these depositions, except, of course, for his own and he has agreed to this."

However, when Mr. Newman withdrew as counsel for plaintiffs on September 14, 1970, the plaintiffs renewed their demand that Spanos be permitted to participate as counsel in this action, and he was ultimately excluded by Order of Court dated November 9, 1970. Plaintiffs' insistence, after Mr. Newman's withdrawal, upon Spanos' right to participate in this case as counsel even though he is not a member of the Bar of this Court or admitted to practice in the State of Illinois was notwithstanding the following portions of a letter dated January 21, 1970 from Rosenthal and Schanfield, who were at that date counsel for plaintiffs to Joseph A. Ruskay of New York City, an attorney representing plaintiffs and Spanos, which letter has been publicly disclosed by Plaintiff Ikaris:

> "There is one very important point that I believe should be discussed now before the depositions are commenced. As you are well aware, Mr. Nick Spanos is now 'of counsel' in this case. Also, at the first deposition of Mrs. Ikaris, there were a few instances in which she was instructed not to answer questions concerning her conversation with Nick because of the attorney-client privilege. I am referring to instances within the last few months or year, and not simply those when he was acting as her attorney in 1964 and 1965. The canons of ethics of the American, Illinois and Chicago Bar Associations flatly prohibit an attorney from acting as an attorney in a case if he is also a material witness in the case. Needless to say, Nick Spanos is going to be the key witness for Plaintiffs in this matter. While it is probable that Seymour Simon will not raise this canon to prevent Nick from testifying, I do not believe that in a case of this consequence, we

> should run such a risk. Judge Robson is one of the Senior Judges of the Northern District of Illinois and is well-known as a stickler for enforcing observance of the canons and proper demeanor in the Courtroom. It is possible that if this were called to his attention, especially during the course of trial, he could either levy disciplinary action against Nick or refuse to permit him to testify. I might also add that our firm might be culpable for permitting this to occur which is something that Bill Rosenthal and I would certainly want to avoid. I have discussed this matter at length with Bill Rosenthal and it is our opinion that Nick should hereafter not act as an attorney in this case. In this regard, we believe it is advisable that he should not even be present at the New York depositions, and at the deposition of Mrs. Ikaris we should not claim the attorney-client privilege between Nick and her as to those discussions which they have had concerning this lawsuit, but I do believe that the attorney-client privilege can be raised as to their prior discussions on the events occurring in regard to the settlement and her original involvement with Icarian and Nispan."

In addition, in the year 1973 the plaintiffs filed lengthy affidavits without leave of Court on which it was necessary for counsel for defendants to spend time for the purpose of determining what response should be made thereto.

7. As found in paragraph 5 of Findings of Fact and Conclusions of Law and Order entered by this Court on January 28, 1974, plaintiffs have changed their attorneys frequently in this action and this has added to the complexity of the matter and substantially to the time which defendants' attorneys were required to devote to it. In addition, the frequent changes of attorneys by plaintiffs has unnecessarily prolonged this action. The last attorneys employed by the plaintiffs were Eleanor Jackson Piel, a member of the Bar of the State of New York, and Rich-

ard F. Watt, a member of the Bar of this Court. Mrs. Piel was granted leave to withdraw as attorney for plaintiffs on July 31, 1973, but the Court denied leave to withdraw to Mr. Watt so that plaintiffs would have counsel in this jurisdiction on which notices directed to plaintiffs could be served. The Court finally granted Mr. Watt leave to withdraw on March 27, 1974, when this cause was dismissed with prejudice. Plaintiffs have not had active counsel of record in this case since Mrs. Piel's motion for leave to withdraw filed early in June, 1973.

8. On or about August 1, 1973 plaintiffs informed the Court by affidavit of Plaintiff Tryforos that they did not desire to proceed with the prosecution of this litigation in this Court and did not seek to continue the litigation and that they were not financially able to go ahead with this litigation unless this Court agreed to transfer the litigation to the United States District Court for the Southern District of New York or to some United States Judicial District other than the Northern District of Illinois.

9. As set forth in paragraph 9 of the Findings of Fact and Conclusions of Law and Order entered by this Court on January 28, 1974, Plaintiff Tryforos and Plaintiff Ikaris appeared in Court in person on both the forenoon and afternoon of November 8, 1973 and advised the Court that they had disposed of their stock in Icarian on October 13, 1973, the result of which was that if plaintiffs had made a *bona fide* disposition of their stock in Icarian they could not continue to maintain this shareholders derivative action on behalf of such corporation or on their own behalf.

10. The aim of the plaintiffs in this action since at least November, 1972, and possibly commencing as early as July, 1972, or prior thereto has been to avoid trial of this case on the merits in this Court and instead to follow a

course of action designed either to persuade this Court to transfer this case to another United States Judicial District or to enable the plaintiffs to relitigate the issues raised by the First Amended Complaint with the individual defendants through either another shareholder of Icarian or by Icarian itself instituting a new action as the plaintiff. Acting in accordance with this plan or scheme, plaintiffs have failed to prosecute this action in good faith, have made misrepresentations to the Court and have engaged in conduct which constitutes a fraud upon the Court and defendants. Moreover, plaintiffs as part of their scheme or plan to terminate this action in a way which would not bar them or persons friendly to them from litigating the same issues in another forum have been guilty of vexations and oppressive conduct in the manner in which they have pursued this litigation. Examples are:

A. The Final Pretrial Order entered on February 20, 1973 contains the following fact admitted by plaintiffs:

> "In a supplemental reply memorandum filed in this cause by plaintiffs in support of their motion to strike defendants' amended counterclaim, plaintiffs advised the Court that the only shareholder of Icarian Development Company not before the Court was Nicholas J. Pastis, 457 Pond Pass, Setauket, Long Island, holder of 300 common shares of Icarian stock for which he paid $10,000." (Final Pretrial Order, page 63, para. 75)

Notwithstanding this admission and representation to the Court in a memorandum filed with the Court by Rosenthal & Schanfield, who were attorneys for plaintiffs prior to the time the Final Pretrial Order was entered, and the approval of the Final Pretrial Order as to form and substance by attorneys Eleanor Jackson Piel of New York City and Richard F. Watt, a member of the Bar of this

Court who were attorneys for plaintiffs at the time the Final Pretrial Order was entered on February 20, 1973, the plaintiffs have attempted to repudiate it by taking the position in paragraphs 10 through 13 and in paragraphs 24 and 25 of an affidavit of Plaintiff Nicholas J. P. Tryforos sworn to on July 30, 1973 and filed with this Court on August 1, 1973, as well as in a telegram Plaintiff Tryforos sent to the Court on June 5, 1973, that there were shareholders of Icarian other than Nicholas J. Pastis not before the Court. This contention has complicated and prolonged the dismissal of this action.

B. The claim by Plaintiff Nicholas J. P. Tryforos in the paragraphs of his affidavit referred to in paragraph 10A above that there were shareholders other than Nicholas J. Pastis who were not parties to this action is inconsistent with and contradicted by allegations set forth in paragraphs 7, 8 and 9 of the Complaint and First Amended Complaint, both of which were verified by Spanos, who was a director and officer of Icarian. In these paragraphs plaintiffs allege that Spanos was entitled to the ownership of 50% of the stock of Icarian, that 300 shares of said 50% of Icarian stock were issued to third parties (these were the 300 shares issued to Nicholas J. Pastis) and the remaining shares of stock of Icarian to which Spanos was entitled, except for 2,850 shares issued to Nispan Corporation, consisted of 2,850 additional shares which remained unissued but which Spanos had the right to have issued to himself and which right he had assigned to Nispan Corporation. These allegations account for the disposition of the entire 50% of the stock of Icarian which Spanos claimed to own and failed to indicate issuance of any of such shares to third parties other than Mr. Pastis.

C. The statement by Plaintiff Tryforos in paragraph 12 of this affidavit sworn to on June 11, 1973 that T. McDonald of Massachusetts, Themistocles Aperguis of London, England, V. G. Spanos of Athens, Greece, and Nicholas Pastis were shareholders of Icarian and that the combined shareholdings of these four individuals is in excess of 20% of Icarian's authorized capital stock of 12,000 shares is inconsistent with and contradicted by the allegations of paragraph 7, 8 and 9 of the Complaint and First Amended Complaint, paragraphs 19 of the Complaint and 25 of the First Amended Complaint and the document marked Defendants' Exhibit 91, which is referred to in paragraph 8 of the Stipulations of Fact on page 12 of the Final Pretrial Order. Paragraphs 7, 8 and 9 of the Complaint and First Amended Complaint account for 6,000 shares of the stock of Icarian none of which were held by said four individuals except for the 300 shares held by Nicholas Pastis. The document marked Defendants' Exhibit 91 establishes that 4,850 shares of Icarian stock were held by those who are referred to in the Complaint and First Amended Complaint as the Manta group which did not include Messrs. Pastis, McDonald, V. G. Spanos or Aperguis. Plaintiffs alleged in paragraph 19 of the Complaint and 25 of the First Amended Complaint, both verified by the oath of Spanos, that the Manta group controlled a majority of the outstanding shares of Icarian. This allegation obviously could not be true (as Spanos swore it was) if Nispan owned 2,850 shares and had the right to have an additional 2,850 shares issued to it, and Messrs. Pastis, McDonald, V. G. Spanos and Aperguis owned in excess of 20% of 12,000 shares or in excess of 2,400 shares (as Plaintiff Tryforos swore to be true) since then the 4,700 shares to which Nispan was entitled, the 4,850 shares controlled by the Manta group, and the 2,400

shares or more owned, according to Plaintiff Tryforos, by Messrs. Pastis, McDonald, V. G. Spanos and Aperguis add up to at least 12,950 shares while Plaintiff Tryforos has sworn that the authorized capital stock of Icarian consists of only 12,000 shares. Moreover, if, as the First Amended Complaint alleges, Nispan owned 2,850 shares with the right to have an additional 2,850 shares of Icarian stock issued to it, and if as Plaintiff Tryforos alleges Messrs. Pastis, McDonald, V. G. Spanos and Aperguis owned at least 2,400 shares of Icarian, the Manta group with 4,850 shares of Icarian stock would not have controlled a majority of the outstanding shares in Icarian and this would be contrary to the allegations of paragraph 19 of the Complaint and paragraph 25 of the First Amended Complaint that "a majority of the outstanding shares in Icarian are controlled by the Manta group."

D. Although in his affidavit sworn to on July 30, 1973 and filed early in August, 1973 without leave of Court, Plaintiff Nicholas J. P. Tryforos stated that plaintiffs did not seek to continue to litigate in the Northern District of Illinois, that they did not wish to proceed with this action and that they did not have the financial ability to go ahead with this litigation as set forth in Finding No. 8 above, Mr. Tryforos in the same affidavit moved that the Court transfer the case for further proceedings to some United States District Court other than the Northern District of Illinois and that as far as the plaintiffs were concerned, the transferee court could be any other court although they preferred that the case be transferred to the United States District Court for the Southern District of New York. It appears therefore that the plaintiffs were interested in further proceedings in this litigation and would have the financial ability to proceed in this litigation provided it were transferred to another United States

judicial forum and what the plaintiffs have been seeking to do by their many affidavits and their intransigence is to succeed in having this case transferred to a United States District Court outside this Judicial District with the hope that they could start the litigation over again and not be bound by the discovery that had taken place and the record they had made in this Court.

E. Similarly, plaintiffs' representation to the Court on November 8, 1973 that they had disposed of their stock in Icarian was for the purpose and with the intent of putting themselves in the position of justifying their refusal to proceed any further with this action. The Court makes this finding because of the fact that Icarian at the time of filing of this action and ever after including up to November 8, 1973 was not an operating company, it had no office, it had no business, it had no assets with the possible exception of this cause of action, and under these circumstances it is not believable that any person would make a *bona fide* purchase of the stock of Icarian which plaintiffs claimed to own except for the purpose and with the intent of attempting to continue to litigate this action in some other forum. Moreover, although on November 8, 1973 Plaintiffs Tryforos and Ikaris represented to the Court in open Court that they would promptly advise the Court as to the details of their disposition of the stock of Icarian and the name of the person to whom they had transferred it, it was not until two months later that the plaintiffs offered any information to the Court regarding their claimed disposition of said stock. It is a strange circumstance that a document filed in this Court on January 9, 1974 which purports to have been signed by Plaintiff Tryforos and which sets forth information with respect to the disposition by plaintiffs of their stock of Icarian, although in the form of an affidavit does not appear to have been sworn to be-

fore any Notary Public or person authorized to take oaths. Therefore, the information which has been furnished to the Court by plaintiffs with respect to their claimed disposition of the shares of Icarian stock is unverified.

F. Although Spanos and his sister, Plaintiff Ikaris, were living at the same address in Brooklyn, New York (6714 Ridge Blvd., Brooklyn, New York) and had the same telephone number (Area Code 212, 833-7763) and were in communication with each other, and although Spanos chose or approved of many of the attorneys plaintiffs have used in this case including Richard F. Watt and Eleanor Jackson Piel, Spanos, an officer and director of Icarian, assisted Icarian in filing an action against the plaintiffs in this cause in the Supreme Court of the State of New York, County of New York (Index Number 25663/72) seeking to enjoin the plaintiffs here (Tryforos and Ikaris) from proceeding with this action. Richard F. Watt, who was representing the plaintiffs in this cause at the time said action was filed in the Supreme Court of the State of New York, County of New York, wrote to Plaintiff Ikaris about the New York action in a communication dated December 18, 1972 as follows, the underscoring [italics] being supplied:

> "So far as the injunction proceeding in New York is concerned, I regard it as a wholly unwarranted and irresponsible step. The representation you and Mr. Tryforos, as representatives of Icarian, have received from Mrs. Piel and from this office has been thoroughly professional and competent. There are some people, apparently, who believe that if everything does not go as they wish in court the fault must be that of the attorneys. Unfortunately, life and litigation do not always develop as one would wish; a contest is a contest, and there is no guarantee that the 'just' cause always wins. Offhand, if an injunction were issued in New York barring you and Mr. Tryforos from pro-

ceeding, a claim would be made here that Mr. Spanos had procured it. What the Judge would do, I simply do not know, but I am inclined to believe that he would continue with his determination to bring the case to trial. You and Mr. Tryforos would then be faced with a very difficult choice. *In my view, it would be far better for the time, effort, and money being devoted to the injunction case in New York to be made available for the prosecution of the case before Judge Robson.*

"I have attempted to respond as frankly as possible. I have not discussed any of these matters with Mrs. Piel since receiving your letter of December 9th; for purposes of your having the benefit of my thinking, it is perhaps better that I write about the case as I see it. Mrs. Piel may or may not agree with everything I have said.

"Two final points: First, Mrs. Piel and I have a good working relationship. I value her judgment, and she values mine. Such differences in viewpoint as we have had over the past 16 months we have discussed and resolved without difficulty. In my view, she has done an outstanding job, and the fact that she has put in hundreds and hundreds of hours, devoted many week-ends to the case, and disrupted her regular practice by coming to Chicago on numerous occasions is a tribute to her professional integrity and her complete devotion to the interests of her clients. There are precious few lawyers who would have done what she has done. *It therefore is disturbing, to put it mildly, to hear (from Mrs. Piel) that Mr. Spanos wishes to demonstrate her incompetence (and presumably mine as well) in order to justify an attempt to obtain an injunction in New York.*"

Mr. Watt's communication which Plaintiff Ikaris chose to make a matter of public record in the New York litigation establishes that the injunction proceedings filed in the Supreme Court of the State of New York, constituted an ef-

fort participated in by plaintiffs and Mr. Spanos to end this litigation in order that the same cause of action might be instituted in another court.

G. In paragraphs 8 and 9 of his statement dated January 7, 1974, and filed in this Court, plaintiff Tryforos contended that plaintiffs and stockholders of Icarian had not been represented in this proceeding and that this was therefore not a "true adversary proceeding." His explanation was that various attorneys purported to appear on behalf of plaintiffs, but they had not sought in any way to represent plaintiffs or the shareholders of Icarian or to protect their rights. This is contradicted by the record in this case which establishes that plaintiffs have been represented by several reputable and capable members of the Bar of this Court chosen by plaintiffs and Spanos including David J. Krupp, William P. Rosenthal and Harvey J. Barnett of Rosenthal & Schanfield, Allan J. Newman, Barry Kroll and Richard F. Watt as well as Eleanor Jackson Piel, a member of the Bar of the State of New York and the Court has personal knowledge that these attorneys presented plaintiffs' case in a vigorous, loyal and able manner. The Court concludes that the statements of Plaintiff Tryforos, himself a lawyer, are designed to be used in another forum to challenge the dismissal of this case with prejudice on the ground that plaintiffs and the other shareholders of Icarian were not properly represented in this action. The criticism of their own counsel in which plaintiffs have freely engaged has been repeated in an affidavit filed by Spanos in an action Icarian is attempting to maintain in the United States District Court for the Southern District of New York based on the same facts as relied on in this action except that Spanos in his affidavit excludes Mr. Jaros and Mrs. Hurst from his attack upon counsel for plaintiffs in this case while Plaintiff Tryforos appar-

ently includes even them. Plaintiff Ikaris in an affidavit sworn to on February 2, 1973, stated that in her opinion every one of the attorneys who represented plaintiffs in this case prior to Mrs. Piel and Mr. Watt and except for Mr. Jaros and Mrs. Hurst had already damaged Icarian when he was replaced and would have caused even greater damage if he had not been replaced.

11. In view of plaintiffs' stated refusal to proceed with prosecution of this action, their unverified claim that they disposed of their stock in Icarian on October 13, 1973, which, if true, precludes them from continuing to maintain this action on behalf of Icarian or on their own behalf, the failure of plaintiffs to act in good faith, their misrepresentations, and the oppressive and vexatious manner in which they have prosecuted this action and unnecessarily prolonged it, and in view of the plaintiffs having filed this action as one seeking equitable relief, the Court finds that the defendants represented by Attorneys Simon, Fleisher and Harris are entitled to be awarded reasonable attorneys' fees and costs.

12. Seymour F. Simon has devoted 1,156¾ hours to the defense of this action and in view of the number of years the action has been pending, the complexity of the proceeding and the specific nature of the matters to which such time was devoted, the Court finds that this amount of time was required to be spent by Mr. Simon in order to properly defend his clients. Mr. Simon graduated from the Northwestern University School of Law in 1938, and was admitted in that year to the Bar of the State of Illinois and the Bar of this Court. He has practiced law in the City of Chicago since January, 1946 and has participated in the prosecution and defense of many lengthy and complicated cases in this Court as well as in United States Dis-

trict Courts in various other judicial districts and he has practiced law extensively in County Courts of Cook County. A reasonable fee for Mr. Simon's services in this action is $75,000.

13. Max M. Fleisher has devoted 201½ hours to the defense of this action and in view of the number of years the action has been pending, the complexity of the proceeding and the specific nature of the matters to which such time was devoted, the Court finds that this amount of time was required to be spent by Mr. Fleisher in order to properly defend his clients. Mr. Fleisher graduated from the Northwestern University School of Law in 1938, and was admitted to the Bar of the State of Illinois and to the Bar of this Court in 1938 and since that time has been actively engaged in the private practice of law in Chicago, Illinois. He has participated in many lengthy and complicated cases in this Court and has practiced law extensively in the County Courts of Cook County. A reasonable fee for Mr. Fleisher's services in this action is $10,000.

14. H. Reed Harris has assisted Mr. Simon in the defense of this action. He graduated from the Northwestern University of Law in 1960 and was admitted to the Bar of the State of Illinois in 1960 and to the Bar of this Court in 1962. He has been in private practice in Chicago, Illinois since 1960. Mr. Harris has devoted 256½ hours to this matter and in view of the complexity of this matter and the nature of the services Mr. Harris was required to render, a reasonable fee for his services is $7,500.

15. In addition, from approximately June, 1970 until July, 1971 when he became an Associate Judge of the Circuit Court of Cook County and withdrew from this case for that reason, Nathan Engelstein, a member of the Bar

of this Court and of the Bar of the State of Illinois, represented Helen Manta and Clara Manta Karones. Although Mr. Engelstein devoted many hours to the defense of his clients, no claim is being made by Helen Manta and Clara Manta Karones for award of attorneys' fees to them by reason of Mr. Engelstein's services.

16. No objections have been made by plaintiffs to the award of attorneys' fees, plaintiffs not having appeared at the hearing on attorneys' fees held by this Court on April 4, 1974, or objected otherwise. The reasonableness of the attorneys' fees which the Court has determined to award to the defendants is in a measure conceded by Plaintiff Tryforos since in his affidavit sworn to on June 11, 1973 and filed shortly thereafter with this Court, Mr. Tryforos in commenting upon a statement in a motion submitted by defendants dated May 31, 1973 in which defendants claim that their attorneys' fees would exceed $50,000 argued that the figure $50,000 "is far too low for the continuous services on an almost daily basis for more than five years which the record reflects" Mr. Simon had rendered. And, in making this statement, Plaintiff Tryforos was disregarding the services of Messrs. Engelstein and Fleisher. (Paragraph 7 of Plaintiff Tryforos' affidavit sworn to on June 11, 1973.) Since June 11, 1973, Mr. Simon has devoted many additional hours to this matter.

IT IS THEREFORE ORDERED that on the Petition of Defendants for Award of Attorneys' Fees the judgment of dismissal with prejudice entered on March 27, 1974 is amended by entering judgment against Plaintiffs Nicholas J. Tryforos and Bebe Spanos Ikaris, jointly and severally, and in favor of defendants George L. Manta, Christ Karafotias, Barbara Manta, Frank J. Manta

(a/k/a Mark Frank Manta), Leo J. Manta, Stephen J. Manta, Helen Manta, Leo G. Manta, Clara Manta Karones, Angela Manta Karafotias, Niki Manta Marx, Frank J. Manta and Leo J. Manta as Co-Executors of the Estate of John L. Manta, Deceased, and J. L. Manta, Inc. in the amount of $92,500 for reasonable attorneys' fees incurred by said defendants, together with costs to be taxed against plaintiffs by the Clerk of this Court, said judgment for $92,500 to be in addition to the judgment dismissing this cause with prejudice. In addition, costs in an amount to be determined shall be taxed against plaintiffs by the Clerk of the Court.

DATED: April 10, 1974.

Enter: *Edwin A. Robson*
United States District Judge

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 74-1590, 74-1591 and 74-1676

NICHOLAS J. P. TRYFOROS and BEBE SPANOS IKARIS,
Plaintiffs-Appellants,

and

VASILLIOS G. SPANOS,
Appellant,

v.

ICARIAN DEVELOPMENT COMPANY, S.A., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 68 C 656
Edwin A. Robson, *Judge.*

Argued February 3, 1975 — Decided July 3, 1975

Before PELL, STEVENS, and DOYLE,* *Circuit Judges.*

STEVENS, *Circuit Judge.* These consolidated appeals seek reversal of orders dismissing a shareholder derivative action with prejudice and awarding defendants a judgment of $92,500 for their attorneys' fees. The three appellants include two former shareholders of Icarian Development Company, S.A. ("Icarian"), a Panamanian

* Circuit Judge William E. Doyle of the Tenth Circuit is sitting by designation.

corporation, who initiated this action back in 1968, and Vasillios G. Spanos, a resident of Greece, who, on March 11, 1974, responded to a notice to shareholders for the purpose of objecting to the proposed dismissal of the action.[1] We must consider (1) the appellants' standing; (2) whether it was proper for the dismissal to be with prejudice; and (3) whether, as a matter of Illinois law, the district court's findings support the award of fees.

The complaint filed by appellants Tryforos and Ikaris [2] on April 8, 1968, alleged that the 13 defendants,[3] other than Icarian, had misappropriated $285,000 in corporate assets. Process was purportedly served on Icarian by delivering a copy of the summons to the wife of Icarian's president at his residence. No attorney ever entered an appearance on behalf of Icarian. All other defendants did appear and have been represented by the same counsel throughout the bitter and protracted pretrial proceedings.[4]

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[1] Prior proceedings in the case are reported at 47 F.R.D. 191 (N.D. Ill. 1969) and 49 F.R.D. 1 (N.D. Ill. 1970).

[2] Plaintiffs had been appointed liquidating trustees of Nispan Corporation, which had held stock in Icarian since 1963. They are both citizens of New York.

[3] George L. Manta, Christ Karafotias, Barbara Manta, Frank J. Manta (a/k/a Mark Frank Manta), Leo J. Manta, Stephen J. Manta, Helen Manta, Leo G. Manta, Clara Manta Karones, Angela Manta Karafotias, Niki Manta Marx, Frank J. Manta and Leo J. Manta as co-executors of the Estate of John L. Manta, deceased, and J. L. Manta, Inc.

[4] The 44-page docket sheet includes over 500 entries.

Plaintiffs, however, changed their attorneys frequently,[5] and thereby, according to the district court's findings, added to the complexity of the matter unnecessarily, prolonged the action, and increased the time which defendants' counsel were required to spend.[6] The extensive dis-

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[5] Finding No. 5 entered by the district court on January 28, 1974, in support of the order directing the notice of a proposed dismissal to be sent to shareholders reads as follows:

> "5. Plaintiffs have been represented by a succession of attorneys. They have been represented by the following attorneys successively during the time periods indicated:
>
> David J. Krupp, from the filing of the action until October 22, 1969;
>
> William P. Rosenthal and Harvey J. Barnett and Rosenthal & Schanfield from October 22, 1969 to February 10, 1970;
>
> Mrs. Ruby LaNace Hurst, from February 16, 1970 to November 9, 1970;
>
> Robert G. Jaros, from March 4, 1970 to November 9, 1970;
>
> Allan J. Newman and Robert S. Foster, from May 6, 1970 to September 14, 1970;
>
> Barry L. Kroll, from September 22, 1970 to August 13, 1971;
>
> Eleanor Jackson Piel and Richard F. Watt, from August 13, 1971. Mrs. Piel was granted leave to withdraw on July 31, 1973. Mr. Watt has moved for leave to withdraw as attorney for plaintiffs, but the Court has denied leave for the purpose of continuing to have counsel in this jurisdiction on which notices directed to plaintiffs can be served.
>
> In each instance in which plaintiffs' counsel was replaced, a motion was made by such counsel for leave to withdraw and the motion was granted by the Court. It appeared in each instance that the withdrawal of counsel for plaintiffs, except possibly the withdrawal of Mr. Jaros, was the consequence of disagreements between plaintiffs and their counsel as well as in some instances failure of plaintiffs to pay their counsel." Plaintiffs' App. at 167-168.

[6] *See* Finding No. 7 entered on April 10, 1974, in support of the award of fees. Plaintiffs' App. 183-184.

covery and preparation culminated in the entry of a 77-page Final Pretrial Order on February 20, 1973.[7] The court found, however, that plaintiffs deliberately sought to avoid a trial on the merits in the Northern District of Illinois, having determined some time in 1972 that it would be more advantageous to litigate in another forum.[8]

On November 8, 1973, plaintiffs advised the court that they had disposed of their stock in Icarian. After requiring them to submit evidence that a bona fide sale had been made, the court concluded that plaintiffs could not maintain the derivative action on behalf of the corporation and directed the clerk to mail a written notice of a proposed dismissal with prejudice to all shareholders or persons claiming to be shareholders. Such a notice was sent to appellant Vasillios G. Spanos. The notice stated that any person desiring to appear on behalf of Icarian should so indicate in writing on or before March 4, 1974, and appear in person or by counsel in open court on March 11, 1974.[9]

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[7] The contested issues of fact identified in the pretrial order included:

> "15. Was Icarian Development Company, S.A. properly served and is it a necessary and indispensable party in this action?" Plaintiffs' App. at 89.

[8] On or about August 1, 1973, the plaintiffs informed the court that they did not want to proceed with the litigation, apparently for a mixture of financial and tactical reasons. *See* Finding No. 8 entered on April 10, 1974. Plaintiffs' App. 184.

[9] The notice provided, in pertinent part:

> "The Court had indicated that it proposes to enter an order of dismissal with prejudice on March 11, 1974, on the grounds of failure to prosecute and disposition by plaintiffs of their shares of Icarian Development Company, S.A. If you wish to appear in said action on behalf of Icarian Development Company, S.A., you are requested to notify the undersigned in writing on or before March 4, 1974, and to appear in person or by counsel . . . on March 11, 1974. . . ."

The notice made no reference to the procedure to follow if a shareholder merely wanted to object to the form of the dismissal.

On March 11, 1974, Sean M. O'Hara, a member of the California Bar, who represented that he was counsel for Vasillios G. Spanos, an Icarian shareholder, appeared before the district court [10] and tendered written objections to the proposed dismissal with prejudice. He asserted that the record disclosed that Icarian had never been made a party to the litigation and therefore that it would be improper to dismiss the action with prejudice. The district court authorized O'Hara to appear on behalf of Mr. Spanos and granted him leave to make the objections a part of the record.[11] He stated, however, that he wanted Spanos "to subject himself to the jurisdiction of the court individually so that if there is anything in the way of contempt or otherwise growing out of this, he will be subject to the jurisdiction of this court," and directed that within two weeks he file a petition unambiguously stating that he was not a participant in pending New York litigation or in any way in collusion with the plaintiffs.[12] After further colloquy, the judge stated that he would deny O'Hara's right to appear,[13] that he wanted further evidence of Spa-

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[10] A member of the local Bar orally moved the admission of Mr. O'Hara "for purposes of this matter" in accordance with Rule 6(b) of the General Rules of the United States District Court for the Northern District of Illinois. Transcript of Proceedings, March 11, 1974, at 3-4.

[11] Transcript of Proceedings, March 11, 1974, at 17.

[12] *Ibid.*

[13] Transcript at 21.

nos' stock ownership, and that he was denying Spanos' objections.[14]

Subsequently, on March 25, 1974, a member of the local Bar who did not enter a formal appearance for Spanos, tendered another set of written objections prepared by O'Hara; he again relied on the failure to serve Icarian as a reason for not dismissing the action with prejudice. He also tendered the affidavit of Vassilike G. Spanos, wife of V. G. Spanos, which stated that her husband was a shareholder of Icarian but was unable to file a personal affidavit within the time limits set by the court because he was residing in Greece. Two days later, on March 27, 1974, the district court ordered the appearance of O'Hara stricken from the files of the court[15] and granted defendants' motion to deny O'Hara leave to file the further objections of V. G. Spanos. The order stated that filing was denied because O'Hara was not a member of the Bar of the State of Illinois or of the district court and because O'Hara had failed to file a petition signed by V. G. Spanos himself as ordered by the court.[16]

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[14] Transcript at 28.

[15] Such an appearance had been filed on March 11, 1974.

[16] The order further amplified the reasons for denying the objections of V. G. Spanos tendered by O'Hara on March 11, 1974:

> "The objections to the Findings of Fact, Conclusions of Law and Order presented by Mr. O'Hara on March 11, 1974, are also denied on the ground that they do not constitute a Petition by V. G. Spanos and that the filing of such objections would not subject V. G. Spanos who the Court is informed claims to be a citizen and resident of Greece to the jurisdiction of this Court, and on the further ground that although V. G. Spanos was granted until March 25, 1974 to place his own Petition of record he has failed to do so, or to appear or to request the Court to grant any extension of time beyond March 25, 1974 for the purpose of doing so."

Thereafter, on March 27, 1974, the case was dismissed with prejudice for failure of the plaintiffs to prosecute.[17] Jurisdiction was retained for the purpose of assessing attorneys' fees, which were awarded the defendants on April 10, 1974, in the amount of $92,500.

O'Hara filed a notice of appeal on April 25, 1974, from the two district court orders on behalf of the two plaintiffs and V. G. Spanos (No. 74-1591). In response to defendants' motion, the district court on May 7, 1974, quashed this notice of appeal, ruling that O'Hara was not an attorney of record for any of the three appellants, that he had not filed the affidavit required by District Court Rule 39,[18] and that appellants were not represented by counsel having an office within the district.[19] In response, Tryforos and Ikaris filed a *pro se* notice of appeal on May 10, 1974 from the dismissal with prejudice and award of attorneys' fees (No. 74-1590), and O'Hara filed a notice of appeal on June 4, 1974, from the order quashing his first notice (No. 74-1676).

Before this court all three appellants contend that the district court erred in entering the dismissal with prejudice because the court lacked *in personam* jurisdiction over Icarian, an indispensable party to the derivative action.

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[17] No other shareholders appeared either to object to the proposed dismissal or to attempt to intervene.

[18] Affidavit Evidencing Ethical Conduct.

[19] N.D. Ill. (Gen.) R.7 requires that an attorney not having an office within the Northern District of Illinois designate a local member of the bar upon whom service of papers may be made. On March 11, O'Hara had stated that he would supply the court with a name within five days, but this was, apparently, never done.

They allege that Icarian was never served with process and never appeared to submit itself to the court's jurisdiction. Tryforos and Ikaris also challenge the lower court's jurisdiction and authority to award the attorneys' fees.

I.

Although all three appellants challenge the district court's jurisdiction because of the alleged failure to obtain *in personam* jurisdiction over Icarian, their interests in the appeal are quite different. Appellants Tryforos and Ikaris are, of course, vitally interested in the judgment awarding $92,500 in fees to the defendants. Since they have sold their Icarian stock, however, they have no interest in the judgment dismissing Icarian's claim with prejudice unless that action was a necessary predicate to the fee award. We think it plain, however, that the character of the dismissal as either with or without prejudice is irrelevant to the question whether the fee award was proper.[20] We conclude that appellants Tryforos and Ikaris have standing to attack the judgment for fees but no standing to challenge the dismissal with prejudice.

On the other hand, appellant Spanos has no personal stake in the fee award, but as a shareholder of Icarian does have an interest in the character of the dismissal.[21]

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[20] We also disagree with the suggestion that the failure to join an indispensable party was a jurisdictional defect which precluded an award of fees. *See* n. 25, *infra*.

[21] If the district court's dismissal with prejudice were to be upheld, it would presumably bar any further litigation by either Icarian or any of its shareholders seeking recompense for defendants' alleged wrongdoing. *See* 13 W. Fletcher, Cyclopedia of the Law of Private Corporations § 6043 (1970 Rev'd Vol.).

His standing is questionable not because of his lack of interest but rather because it is unclear, as a matter of procedure, that he sufficiently subjected himself to the jurisdiction of the district court to entitle him to prosecute this appeal.[22] That question is not an easy one.

The question breaks into two parts: whether Spanos complied with the conditions imposed by the district court for filing objections to the proposed dismissal, and whether those conditions were appropriate. The district court found Spanos' objections unacceptable because (a) no member of the local Bar had entered an appearance on his behalf, and (b) the objections were not supported by a sworn "petition" executed by Spanos himself. The court's reasons for insisting on such conditions were the expressed desire to be able to hold Spanos accountable for costs or contemptuous conduct if such should thereafter occur. In addition, the district court wanted assurance that Spanos was not merely trying to protect the ability of other interests further to pursue their claim in another forum.

If Spanos had requested leave to appear for the purpose of further prosecuting the litigation on behalf of Icarian, there could be no question about the reasonable-

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[22] The law is clear that a non-party shareholder who appears, pursuant to a Rule 23.1 notice, to present objections to a proposed dismissal or settlement of a derivative action may appeal an adverse decision even though he has not been formally made a party to the action. *Cohen* v. *Young*, 127 F.2d 721, 724 (6th Cir. 1942); *Ackert* v. *Ausman*, 217 F.Supp. 934, 935 (S.D.N.Y. 1963); 3B J. Moore, Federal Practice ¶ 23.1.24[3] (1974); *cf. Pianta* v. *H. M. Reich Co.*, 77 F.2d 888, 890 (2d Cir. 1935). Similarly, no such appeal may be taken by a shareholder who has failed to make such an appearance. *Cf. Research Corp.* v. *Asgrow Seed Co.*, 425 F.2d 1059, 1060-1061 (7th Cir. 1970).

ness of the conditions imposed by the court. In view of the unstable and transitory character of the representation of the interests of Icarian shareholders throughout the litigation, the court was understandably concerned about the quality of a Greek shareholder's representation by California counsel in Chicago litigation involving an inactive Panamanian corporation. The objection which Spanos sought to raise, however, merely went to the form of the dismissal and did not raise the possibility of further protracted proceedings before the district court. Spanos' attorney merely endeavored to direct the court's attention to a defect in the record which, as he argued, made it inappropriate to dismiss the action with prejudice.

In his initial presentation of the objection, Spanos complied with the local rules of the court,[23] as well as the conditions set forth in the notice to shareholders. His written objections, though signed by O'Hara as his attorney, contained an unqualified representation that he was the owner of 950 shares of Icarian stock. That representation was corroborated, though not proved beyond a reasonable doubt, by the affidavit, to which a copy of Spanos' stock certificate was attached, subsequently executed by Spanos' wife.

We are persuaded that the underlying purpose of the Rule 23.1 requirement of notice to shareholders as a precondition to the dismissal of derivative litigation would be frustrated if the showing made by Spanos in this case

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[23] As noted above, a member of the local Bar moved O'Hara's admission for the purposes of the motion, representing that he was duly admitted to practice in California. In colloquy it was also developed that O'Hara had not been involved in any disciplinary proceeding. Nothing in the record suggests any reason why O'Hara should not have been accorded the right to appear on behalf of an objecting shareholder.

was considered insufficient to entitle him to file his objections to the form of dismissal. For granting leave to file objections does not involve any determination of their factual or legal sufficiency. Insofar as the conditions imposed by the court in its notice to shareholders were appropriate to the mere filing of objections to the form of the proposed dismissal, they were met by Spanos; the additional conditions subsequently imposed—an appearance by local counsel, a "petition" personally executed by Spanos and a denial of association with a plan to pursue litigation in another forum—were not appropriate conditions to the filing of Spanos' objections. We conclude that Spanos adequately raised the questions of the district court's jurisdiction over Icarian and, since Icarian was admittedly an indispensable party, the propriety of dismissing the action with prejudice.

We are also satisfied that the district court exceeded its power when, on May 7, 1974, it entered an order purporting to quash the notice of appeal filed on April 25, 1974, by O'Hara on behalf of appellant Spanos. Even if that notice was defective because not signed by a member of the local Bar, such a defect was surely not jurisdictional. Power to quash the notice was therefore vested in this court rather than the district court. No motion to dismiss the first appeal having been made in this court, we need not consider the significance of the failure to have the notice executed by a member of the local Bar.[23a] Accordingly, we turn to the merits.

[23a] As we conclude that an effective notice of appeal was filed on behalf of all three appellants on April 25, 1974, within 30 days of the March 27, 1974, order dismissing the action with prejudice, it is clear that the issue of the propriety of such a disposition is appropriately before us. *See Swanson* v. *American Consumer Industries, Inc.*, Nos. 74-1430, 74-1434 (7th Cir., May 29, 1975).

II.

In a shareholders' derivative action brought on its behalf Icarian was certainly an indispensable party. No judgment could effectively bind the corporation unless the court first acquired *in personam* jurisdiction over it. *Davenport* v. *Dows,* 85 U.S. (18 Wall.) 626, 627. Since no appearance was filed on behalf of Icarian, it was not a party unless it was validly served with process. Service on the wife of the president of the corporation does not constitute effective service under Rule 4(d)(3) of the Federal Rules of Civil Procedure.[24]

There is nothing in the record, including the Marshal's Return, to identify the individual to whom the summons was delivered as an agent authorized to receive service of process on behalf of the corporation. Moreover, since the record discloses that there was a subsequent unsuccessful attempt to effect service on the corporation, and since one of the contested issues identified in the Final Pretrial Order was the sufficiency of the service of process on Icarian, the ambiguous Marshal's Return provided an inadequate basis for the court's conclusion that all defendants had been served with process.

Inasmuch as Icarian was not a party to the litigation, the order of dismissal was necessarily without prejudice to the rights of the corporation.

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[24] The rule provides that service shall be made as follows:

"(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant."

III.

We do not accept appellants' contention that the failure to join an indispensable party deprived the district court of power to award fees.[25] On the other hand, the Supreme Court's recent decision in *Alyeska Pipeline Service Co.* v. *The Wilderness Society*, 43 U.S.L.W. 4561, 4567 n. 31 (May 12, 1975), requires us to reject appellees' position that we should look to federal law as authority for the award. Since this is a diversity case, the question of plaintiffs' liability for defendants' fees must be determined by the

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[25] While some early decisions apparently spoke of the failure to join an indispensable party as a jurisdictional defect, it is clear that the far greater weight of authority is to the contrary. As the Supreme Court indicated as long ago as *Mallow* v. *Hinde*, 25 U.S. (12 Wheat.) 123, 126:

> "We do not put this case upon the ground of jurisdiction, but upon a much broader ground. . . . We put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court."

Thus, the reason for a dismissal, upon the failure to join an indispensable party, is not jurisdictional, but is based on a determination by the district court that, in its equitable discretion, it ought not to proceed to render a decision that might affect that absent party's rights. *See* discussion and cases cited in 3A J. Moore, Federal Practice ¶19.05[2], at 2209 & n. 7 (1974); 7 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 1611, at 115-116 & n. 21 (1972). As Professors Wright and Miller have emphasized:

> "[I]t is important to recognize that the federal court does have jurisdiction both over the parties properly before it and the subject matter of the action, even though the indispensable party cannot be joined." *Id.*, § 1611, at 118 (footnote omitted).

In this case, even absent Icarian, the district court possessed personal jurisdiction over all other parties and subject matter jurisdiction over the controversy.

law of Illinois. *Trust Co. of Chicago* v. *National Surety Corp.*, 177 F.2d 816, 818 (7th Cir. 1949).[26]

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[26] Appellees argue that the decisions of the Supreme Court in *Hall* v. *Cole*, 412 U.S. 1, 5; *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 n. 4; and *Vaughn* v. *Atkinson*, 369 U.S. 527, overruled *Trust Co.* insofar as they recognized the unquestioned power of a federal court to award counsel fees to a successful party when his opponent has acted

"in bad faith, vexatiously, wantonly, or for oppressive reasons." 412 U.S. at 5, quoting 6 J. Moore, Federal Practice ¶ 54.77[2], p. 1709 (2d ed. 1972).

None of these Supreme Court decisions was a diversity case, however. In *Alyeska Pipeline Service Co.* v. *The Wilderness Society*, 43 U.S.L.W. 4561 (U.S., May 12, 1975), the Court reaffirmed the continuing validity of the line of cases represented by *Trust Co.* After noting the various equitable exceptions, including that relied upon by appellees here, developed by the federal courts to the prevailing American rule against the award of such fees, the Court stated:

> "A very different situation is presented when a federal court sits in a diversity case. '[I]n an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed.' 6 J. Moore, Federal Practice ¶ 54.77[2] (1974 ed.), at 1712-1713 (footnotes omitted). See also 2 Speiser, Attorneys' Fees §§ 14:3, 14:4 (1973); Annotation, Prevailing Party's Right to Recover Counsel Fees in Federal Courts, 8 L. Ed. 2d 894, 900-901. Prior to the decision in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), this Court held that a state statute requiring an award of attorneys' fees should be applied in a case removed from the state courts to the federal courts: '[I]t is clear that it is the policy of the state to allow plaintiffs to recover an attorney's fee in certain cases, and it has made that policy effective by making the allowance of the fee mandatory on its courts in those cases. It would be at least anomalous if this policy could be thwarted and the right so plainly given destroyed by removal of the cause to the federal courts." *People of Sioux County* v. *National Surety Co.*, 276 U.S. 238, 243 (1928). The limitations on the

(footnote continued)

As we concluded in *Trust Co.*, the law of Illinois in this respect is well settled.

> At common law costs were never recoverable, and they can be recovered only in cases where there is statutory authority therefor. Any party claiming a judgment for his costs against his adversary must bring himself within the operation of some statutory provision, and courts have no power to adjudge costs against anyone on merely equitable grounds.

177 F.2d at 818, quoting *Patterson* v. *Northern Trust Co.*, 286 Ill. 564, 568, 122 N.E. 55, 57 (1919). *See also House of Vision, Inc.* v. *Hiyane,* 42 Ill. 2d 45, 61-62, 245 N.E.2d 468, 472 (1969), *appeal dismissed & cert. denied,* 396 U.S. 8.

The only Illinois statutory authorization for the award of attorneys' fees that is arguably relevant is § 41 of the Civil Practice Act, Ill. Rev. Stat. 1973, ch. 110, § 41:

> Allegations and denials, made without reasonable cause and not in good faith, and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with a reasonable attorney's fee, to be summarily taxed by the court at the trial.

(footnote continued)

> awards of attorneys' fees by federal courts deriving from the 1853 Act were found not to bar the award. *Id.*, at 243-244. We see nothing after *Erie* requiring a departure from this result. See *Hanna* v. *Plumer,* 380 U.S. 460, 467-468 (1965). The same would clearly hold for a judicially created rule, although the question of the proper rule to govern in awarding attorneys' fees in federal diversity cases in the absence of State statutory authorization loses much of its practical significance in light of the fact that most States follow the restrictive American rule. See 1 Speiser, *supra,* §§ 12:3, 12:4."
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> 43 U.S.L.W. at 4567 n. 31.

Thus, it is to state law that the district courts must look in determining whether attorneys' fees may be awarded in a diversity case.

In discussing the purpose of § 41, the Illinois Appellate Court in *Ready* v. *Ready,* 33 Ill.App.2d 145, 161, 178 N.E. 2d 650, 658 (1961), explained:

> Section 41 is an attempt of the legislature to penalize the litigant who pleads frivolous or false matters or brings a suit without any basis in law and thereby puts the burden upon his opponent to expend money for an attorney to make a defense against an untenable suit.

See also Theodorou v. *Community Builders, Inc.,* 6 Ill. App.3d 277, 280, 285 N.E.2d 474, 476 (1972); *Manchester Insurance & Indemnity Co.* v. *Strom,* 122 Ill.App.2d 183, 190, 258 N.E.2d 150, 153 (1970); *Hearst Corp.* v. *Associated Trade Press, Inc.,* 98 Ill.App.2d 360, 365-366, 240 N.E. 2d 386, 389 (1968). Thus, § 41 has been construed to authorize fees in cases which were instituted in bad faith, or in which untrue matter was alleged in the pleadings.

Appellants do not argue that the fee award may be supported under § 41. The district court's findings clearly do not bring this case within that section. The court concluded that fees were awardable because of the "oppressive and vexatious manner in which [appellants] have prosecuted the action and unnecessarily prolonged it. . . ."[27] Nowhere in the findings or order, however, is

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[27] "In view of plaintiffs' stated refusal to proceed with prosecution of this action, their unverified claim that they disposed of their stock in Icarian on October 13, 1973, which, if true, precludes them from continuing to maintain this action on behalf of Icarian or on their own behalf, the failure of plaintiffs to act in good faith, their misrepresentations, and the oppressive and vexatious manner in which they have prosecuted this action and unnecessarily prolonged it, and in view of the plaintiffs having filed this action as one seeking equitable relief, the Court finds that the defendants represented by Attorneys Simon, Fleisher and Harris are entitled to be awarded reasonable attorneys' fees and costs."

there any suggestion that Tryforos and Ikaris did not institute the suit in good faith, or that the cause of action was essentially frivolous.[28] Accordingly, the award of fees must be set aside.

The judgment of dismissal entered on March 27, 1974, as amended on April 10, 1974, must be modified to provide that it is without prejudice to the rights of Icarian, and to eliminate the award of fees.

So ordered.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[28] Indeed, the denial of plaintiffs' motion for partial summary judgment in the amount of $285,000 was predicated on the existence of genuine issues of fact. At no time has the court made any ruling on the merits of plaintiffs' underlying claim.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
September 5, 1975.

Before
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. John Paul Stevens, Circuit Judge
Hon. William E. Doyle, Circuit Judge*

Nicholas J. P. Tryforos and Bebe Spanos Ikaris,
Plaintiffs-Appellants,

Vasillios G. Spanos,
Appellant,

No. 74-1590, 1591 and 1676 vs.

Icarian Development Co., S.A., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
(68 C 656)

On consideration of the petition for rehearing and suggestion that it be reheard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestion, and all of members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be, and the same is hereby, DENIED.

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* The Honorable William E. Doyle, U. S. Circuit Judge, Tenth Circuit, is sitting by designation.

Rules of Civil Procedure for the United States District Court

Rule 1. *Scope of Rules.* These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy and inexpensive determination of every action.

Rule 4. *Process*

(d) *Summons: Personal Service.* The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

Rule 23.1 *Derivative Actions by Shareholders.*

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter de-

volved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December, 1975, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid to Sean O'Hara, Esq., 3600 Wilshire Boulevard, Room 2120, Los Angeles, California 90010 and Eugene Gressman, 1828 L Street, N.W., Washington, D.C. 20036, Counsel for Respondents. I further certify that all parties required to be served have been served.

H. Reed Harris
39 South LaSalle Street
Chicago, Illinois 60603
Counsel for Petitioners